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No. 84-1602

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

JACK ANDERSON, THE INVESTIGATOR PUBLISHING CO., and BILL E. ADKINS,
Petitioners,

vs.

LIBERTY LOBBY, INC. and WILLIS A. CARTO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS, AND BRIEF OF AMICUS CURIAE THE READER'S DIGEST ASSOCIATION, INC., IN SUPPORT OF POSITION OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS

The Reader's Digest Association, Inc. ("RDA"), is a respondent in a libel case now pending before this Court on petition for writ of certiorari, captioned *The Synanon Church, et al. v. Reader's Digest Association, Inc., et al.*, No. 84-1304. In that case, RDA moved for summary judgment on the ground that petitioners, the Synanon Church and Charles Dederich (hereinafter collectively referred to as "Synanon"), were public figures and that, under this Court's decision in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, there was no evidence of "actual malice" in publication of the article alleged to be libelous. After an extensive examination of the law and evidence, the California Supreme Court concluded that:

> "None of the alleged defamatory statements goes beyond what a responsible staff writer might draft on the basis of the information provided him by his sources. The sources themselves were persons of good, indeed distinguished, reputation. There is *nothing at all* in the record to suggest that [the author] MacDonald or anyone else at the Reader's Digest had any serious doubt as to the reliability of the sources or

> the truth of the challenged statements" (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 266, 208 Cal.Rptr. 137, 151, 690 P.2d 610, 624) (emphasis added).

The court concluded that judgment should be entered in favor of RDA.

In the course of its opinion, the court also observed (although it was unnecessary to its holding) that a libel defendant's summary judgment motion should be granted "unless it appears that actual malice may be proved at trial by clear and convincing evidence" (37 Cal.3d 252, 208 Cal.Rptr. 141, 690 P.2d 614). Synanon filed a petition for writ of certiorari (No. 84-1304), emphasizing and distorting this sentence, and seizing upon contrary dictum in *Liberty Lobby, Inc. v. Anderson* (D.C.Cir. 1984) 746 F.2d 1563, 1570-1571. The Court subsequently granted certiorari in *Liberty Lobby* (No. 84-1602) but thus far has not acted on the *Synanon* petition.

Because the "evidence" submitted by Synanon was insufficient to survive a summary judgment motion under *any* standard, *Liberty Lobby* should have no bearing on the litigation against RDA. Nonetheless, it is apparent that Synanon will continue to argue that the two cases are related. Therefore, RDA has a substantial and immediate interest in the outcome of *Liberty Lobby*. More fundamentally, as a member of the media which must constantly be aware of the possibility of being put to the defense of a libel suit, RDA has a continuing interest in decisions affecting the scope of its First Amendment rights.

In the course of Synanon's litigation against RDA, and in other litigation, counsel for RDA have become fully familiar with the law governing this case. In the attached amicus brief, we demonstrate that the chilling effect of protracted libel litigation such as that initiated by Synanon is very real, and that therefore it is imperative that the constitutional protections under the substantive law governing such litigation be applied throughout all stages of the proceedings.

Although petitioners have given consent to the filing of this brief, respondents have refused consent.

For these reasons, we respectfully request that this motion for leave to file a brief amicus curiae be granted.

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BRIEF OF AMICUS CURIAE THE READER'S DIGEST ASSOCIATION, INC., IN SUPPORT OF POSITION OF PETITIONERS

SUMMARY OF ARGUMENT

The issue presented is whether the constitutional limitations upon the substantive law governing libel actions brought by public figure plaintiffs, mandated by the First Amendment under *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, apply upon a motion for summary judgment. In the decision below, the District of Columbia Circuit opined that those constitutional limitations applied only after a full trial and that, in particular, clear and convincing evidence of actual malice need be shown only at trial. According to that court, in order to survive a defendant's summary judgment motion and proceed to trial, a public-figure plaintiff need only show "a minimum of facts" in support of its argument that the allegedly defamatory statement was made with

actual malice (*Liberty Lobby, Inc. v. Anderson* (D.C.Cir. 1984) 746 F.2d 1563, 1570).

Prior to *Liberty Lobby*, there had been virtual unanimity among the state and federal courts that the constitutional standard—that a plaintiff must have clear and convincing evidence of actual malice—applied throughout a defamation action, including on a motion for summary judgment. The *Liberty Lobby* court rejected the established rule in favor of one which gives a libel plaintiff the novel procedural advantage of not being required to present, in opposition to a motion for summary judgment, at least *some* evidence from which a reasonable jury could render a verdict in the plaintiff's favor. In doing so, the court was compelled to conclude that the judicial duty of passing upon the constitutional sufficiency of evidence of actual malice applies only after a full trial. The court attempted to justify side-stepping this duty, citing hypothetical and unrealistic "practical" problems in exercising that constitutional duty at the summary judgment stage (746 F.2d 1570-1571). It thus sacrificed constitutional principles for the sake of assumed administrative efficiency.

The *Liberty Lobby* decision is wrong. It is wrong because it incorrectly suggests that the established rule requires a court to deviate from normal summary judgment procedures. It is wrong because its hypothetical problems will not materialize and have not materialized during the many years in which the established rule has been applied by courts throughout the country. Most important, it is wrong because it fails to take into account the social cost of unnecessarily deferring decisions on issues of constitutional protection. This new rule threatens to chill the exercise of First Amendment rights by the media and other speakers aware of its inevitable protractive effect on libel litigation, and therein lies the real danger of the opinion below.

ARGUMENT

I. THE SYNANON LITIGATION AGAINST RDA ILLUSTRATES THE REAL AND SUBSTANTIAL CHILLING EFFECT OF PROTRACTED LIBEL LITIGATION.

This Court has frequently noted the chilling effect of protracted libel litigation, emphasizing that legitimate reporting on important public issues inevitably will be chilled by "[f]ear of large verdicts in damage suits for innocent or merely negligent misstatement, [and] even [by] fear of the expense involved in their defense" (*Time, Inc.* v. *Hill* (1967) 385 U.S. 374, 389). These concerns are not theoretical. Litigation is expensive, and the more protracted it is, the greater is the expense incurred and the burden visited upon the parties:

> "The high cost of litigation can be particularly burdensome to a media libel defendant, which, because it is in the business of making public statements, may also be put in the business of defending many of those statements in libel suits. Even short of going to trial, legal fees for a media defendant in a single case can easily run into five-figure numbers. Fees for a trial and an appeal, which often is required on a libel case, can become astronomical" (Smith, The Rising Tide of Libel Litigation: Implications of the Gertz Negligence Rule (1983) 44 Mont.L.Rev. 71, 87) (footnotes omitted).[1]

The very real, and very costly, harassment occasioned by baseless libel suits is illustrated by Synanon's litigation against amicus RDA and others. As part and parcel of its policy of intimidation of all its critics (see Respondents' Brief in Opposition in No. 84-1304, pp. 2, 14), Synanon has announced to the world that, "[w]hen any news outlet gets out of line with us, we

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[1]It has been reported that defense costs exceeded half a million dollars in each of two recent libel cases (Garbus, "The Limits for Libel," N.Y. Times (7/29/83), p. A-23). And a libel case brought by retired Army officer Anthony Herbert based on a "60 Minutes" broadcast has cost over $4 million to defend during the last 11 years (Kaufman, Press, Privacy and Malice: Reflections on *New York v. Sullivan* [sic] (July 1984) 56 N.Y.St.B.J. 10, 14).

will do everything we can to punish it" (p. 792).[2] And that is precisely what Synanon repeatedly has done. In 1980, the National News Council noted that Synanon's use of protracted litigation had "created an atmosphere of apprehension" and was a "weapon for coercing the press into silence about Synanon and its affairs" (pp. 1184-1185). It concluded that "the public * * * is getting less news about Synanon than it otherwise would because of the chilling effect on editors of the organization's suit-threatening campaign" (p. 1186).

The extreme importance to the public of reports on organizations such as Synanon cannot be overestimated. According to its own frequent and vociferous declarations, Synanon performs important public "good works" in the area of rehabilitation of drug addicts and "character-disordered" persons. In his concurring opinion in *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, Chief Justice Warren noted the emergence in the private sector of groups and persons, such as Synanon, who fulfill roles once considered governmental (388 U.S. 163-164). Because they "often play an influential role in ordering society,"

> "[o]ur citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.' The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct" (388 U.S. 164).

Yet, Synanon's deliberate policy of coercion against the media was effective. Large newspapers and other media organizations remained silent about Synanon's misdeeds, and the job of exposure was left to a small weekly newspaper (with a circulation of 2,700), The Point Reyes Light. The Light's reports on Synanon galvanized local governmental action, and news reports by larger

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[2] Citations herein are to the record below in the *Synanon* case (No. 84-1304).

news organizations followed. Because of its "pioneering expose" of Synanon, the Light was awarded the Pulitzer Prize for "meritorious public service" (p. 603). In announcing the award, the Pulitzer Committee expressly noted that Synanon's litigation tactics had "effectively silenced" other news organizations (p. 603).

The award of the Pulitzer Prize brought other attention to the Light: massive litigation by Synanon against the Light's owners as well as against RDA for its article about the Pulitzer Prize award to the Light. This small newspaper felt the full brunt of Synanon's "punishment" for daring to speak out. The tremendous expense, and the chilling effect, of that litigation are shown by the record. As of February 1983 (when the RDA motion for summary judgment was argued before the trial court in the *Synanon* case), the defendants in that case had produced over 50,000 document pages. Amicus RDA itself had responded to four sets of written interrogatories, and its attorneys, paralegals and legal assistants had expended in excess of 4600 hours in defending the case. Synanon had deposed RDA personnel for 10 days and had taken 14 days of depositions of persons associated with the Light. On the day that the trial court denied RDA's motion for summary judgment, Synanon noticed *30 more* depositions of RDA personnel to continue for 53 consecutive weekdays thereafter (pp. 3287-3288, 3751-3752, 3292, 3294-3295).[3]

Thus, Synanon's deliberate use of litigation to "chill" the media is vividly illustrated here.[4] If such litigation *must* proceed

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[3] In a related case still pending in the California superior court (*Macy/ Burke, et al. v. Reader's Digest Association, Inc., et al.* (Marin County Superior Court No. 108266)), immediately following denial of a motion for summary judgment, Synanon noticed 14 depositions of RDA personnel, noticed, took or continued another 14 depositions of third parties, and announced its intention to conduct a *120-day* trial.

[4] The aggressive role of Synanon's legal department further emphasizes the in terrorem effect of its libel litigation (see *In re Sealed Case* (D.C.Cir. 1985) 754 F.2d 395, 397, 400-401; *Synanon Church v. United States* (D.D.C. 1984) 579 F.Supp. 967, 971-972).

to trial despite the plaintiff's inability to marshall evidence meeting the *New York Times* standard, then the constitutional guarantees will be rendered virtually ineffective.[5]

II. THE FIRST AMENDMENT APPLIES THROUGHOUT THE JUDICIAL PROCESS AND NOT SOLELY AT TRIAL.

A. The requirement of clear and convincing evidence of actual malice is a part of the substantive protection afforded by the First Amendment.

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[5] One commentator has noted other examples of the crippling effect that the high cost of libel defense has had, especially on smaller publications:

> "Libel litigation can be deadly to smaller and less financially secure organizations. * * *
>
> "The owners of the prize-winning *The Texas Observer* related the effects of a libel suit against that newspaper a few years ago. They discussed candidly how the suit forced them to spend all their energy on fund-raising activities to pay for the litigation while important stories, including a 'solid' one on illegal business practices in Dallas, went unreported.
>
> "The editor of the 6000 circulation *Gadsden County Times* of Quincy, Florida, recently discussed the suit against his newspaper by a state senator for stories reporting corporate fraud. He said that even though the insurance company has paid the legal fees, the drain on time and resources because of the suit has made him reluctant to write further investigative stories" (Smith, The Rising Tide of Libel Litigation: Implications of the Gertz Negligence Rule, supra, 44 Mont.L.Rev. 88) (footnotes omitted).

Another example of self-censorship is provided by [MORE] magazine,

> "a small opinion journal, [which] reported that it had deleted much controversial material from an article for fear of litigation costs. Counsel for the magazine advised that, although [MORE] would likely prevail on the merits, the costs of a suit would bankrupt the magazine" (Note, Constitutional Law—Self-Censorship After *Herbert v. Lando*: The Need for Special Pre-trial Procedure in Defamation Action (1980) 58 N.C.L.Rev. 1025, 1035).

The *Liberty Lobby* decision is a startling departure from the rule in virtually every state[6] and federal jurisdiction[7] which has previously considered the issue. The Second Circuit has explained the generally accepted rule:

> "In a case where the defendant has moved for summary judgment on the issue of actual malice and the plaintiff claims that there remain material factual disputes, the court decides the materiality of the disputed facts by accepting the plaintiff's version and applying the actual malice standard. This standard requires a clear and convincing showing, which

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[6] E.g., *Tucci v. Guy Gannett Pub. Co.* (Me. 1983) 464 Atl.2d 161, 166; *Mark v. Seattle Times* (Wash. 1981) 635 P.2d 1081, 1088-1089, certiorari denied (1982) 457 U.S. 1124; *MacGuire v. Harriscope Broadcasting Co.* (Wyo. 1980) 612 P.2d 830, 839; *Dupler v. Mansfield Journal Co., Inc.* (Ohio 1980) 413 N.E.2d 1187, 1192, 1194, certiorari denied (1981) 452 U.S. 962; *Brophy v. Philadelphia Newspapers Inc.* (Pa.Super. 1980) 422 Atl.2d 625, 632; *Nader v. de Toledano* (D.C.App. 1979) 408 Atl.2d 31, 41-50, certiorari denied (1980) 444 U.S. 1078.

[7] E.g., *Brown v. Herald Co., Inc.* (8 Cir. 1983) 698 F.2d 949, 951 (per curiam); *Rebozo v. Washington Post Co.* (5 Cir. 1981) 637 F.2d 375, 381, certiorari denied (1981) 454 U.S. 964; *Steaks Unlimited, Inc. v. Deaner* (3 Cir. 1980) 623 F.2d 264, 275; *Arnheiter v. Random House, Inc.* (9 Cir. 1978) 578 F.2d 804, 805-806 (per curiam); *Fadell v. Minneapolis Star & Tribune Co., Inc.* (7 Cir. 1977) 557 F.2d 107, 108, certiorari denied (1977) 434 U.S. 966; *Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael* (9 Cir. 1974) 492 F.2d 438, 439-441, certiorari denied (1974) 419 U.S. 872; *Herbert v. Lando* (S.D.N.Y. 1984) 596 F.Supp. 1178, 1188; *Prager v. American Broadcasting Cos., Inc.* (D.N.J. 1983) 569 F.Supp. 1229, 1239, affirmed (3 Cir. 1984) 734 F.2d 7; *National Rifle Ass'n v. Dayton Newspapers, Inc.* (S.D.Ohio 1983) 555 F.Supp. 1299, 1304; *Miss America Pageant, Inc. v. Penthouse Intern., Ltd.* (D.N.J. 1981) 524 F.Supp. 1280, 1282-1283; *Loeb v. New Times Communications Corp.* (S.D.N.Y. 1980) 497 F.Supp. 85, 94 n. 15. See also *Lorain Journal Co. v. Milkovich* (1980) 449 U.S. 966 n. 1 (Brennan, J., dissenting from denial of certiorari) (in both the directed verdict and summary judgment contexts "the court is called upon to answer the same question: whether there is sufficient evidence for the jury to find actual malice under the applicable 'clear and convincing evidence' burden of proof").

> may be by circumstantial evidence, of defendant's actual state of mind—either subjective awareness of probable falsity or actual intent to publish falsely. Therefore, a judge in denying a defendant's summary judgment motion must conclude that, based on the evidence asserted in the plaintiff's affidavits, 'a reasonable jury could find malice with convincing clarity' " (*Yiamouyiannis v. Consumers U. of United States* (2 Cir. 1980) 619 F.2d 932, 940, certiorari denied (1980) 449 U.S. 839) (emphasis deleted) (citation omitted).

This decision, and the numerous others in accord with it, correctly apply the *substantive* constitutional law which governs defamation actions brought by public figures. As this Court has emphasized, judges must "review 'the evidence in the . . . record to determine whether it could constitutionally support a judgment' for the plaintiff" (*Time, Inc. v. Pape* (1971) 401 U.S. 279, 284). That review itself depends, in turn, on whether "the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands" (*New York Times Co. v. Sullivan*, supra, 376 U.S. 285-286). This Court has continued to emphasize the constitutionally-mandated judicial role:

> "Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice' " (*Bose Corp. v. Consumers Union of U.S., Inc.* (1984) ___ U.S. ___, 104 S.Ct. 1949, 1965).

This burden of proof is not simply a procedural rule to be applied during and after trial, but it is rather a substantive limitation on a public-figure plaintiff's right to recover (*New York Times v. Sullivan*, supra, 376 U.S. 283; *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 336-337, 342; see *Calder v. Jones* (1984) ___ U.S. ___, 104 S.Ct. 1482, 1488). The First Amendment does not just protect a defendant's exercise of its rights to speak and publish freely, but it also guarantees that suits which violate these rights are "beyond the reach" of state libel law (*New York Times Co. v. Sullivan*, supra, 376 U.S. 277).

Therefore, the substantive constitutional limitations on libel law must be applied at the summary judgment stage in order to make the constitutional protections effective. If a public-figure plaintiff may put a defendant to the expense, inconvenience and uncertainty of a full trial based on evidence which is less than that ultimately required by the Constitution, then the purpose of the substantive constitutional standard is defeated. Incorporation of the clear and convincing evidence standard into the summary judgment determination is the means by which courts minimize the chilling effect of libel litigation and simultaneously afford full First Amendment protection to individual defendants (*Reader's Digest Assn. v. Superior Court*, supra, 37 Cal.3d 252, 208 Cal. Rptr. 141, 690 P.2d 614).

B. No special procedural rules are applicable to libel cases.

The burden on a motion for summary judgment rests, of course, on the moving party. Under Rule 56(c) of the Federal Rules of Civil Procedure, the movant must establish that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In the context of an action governed by *New York Times*, this means that the moving defendant must demonstrate the nonexistence of "actual malice" in the constitutional sense; that is, the defendant must present admissible evidence showing the absence of any genuine issue of material fact regarding lack of knowledge of falsity or awareness of probable falsity. Only when the defendant makes a prima facie showing that no such genuine issue exists does the burden shift to the plaintiff to rebut that showing by submitting *some* evidence establishing that there is a genuine factual dispute on an issue material to the case.

Necessarily, the question whether there is an issue for trial upon which a jury could make the required factual findings will take into account the quantum of proof required in the case—here clear and convincing evidence of actual malice (see *Nader v. de Toledano*, supra, 408 Atl.2d 42; Schwarzer, Summary Judgment under the Federal Rules: Defining Genuine Issues of Fact (1983) 99 F.R.D. 465, 487-488). Where the *plaintiff* is the moving party, clear and convincing proof of actual malice must be shown on a motion for summary judgment; otherwise the movant could

prevail on summary judgment by a lower standard of proof than that required after a full trial (see *Beamer v. Nishiki* (Haw. 1983) 670 P.2d 1264, 1270). There is no logical reason why the substantive constitutional rule should not also apply when the public-figure plaintiff is the non-moving party.[8]

This does not mean that any "special" procedural rules apply at the summary judgment stage. To the contrary, as in all summary judgment motions, the trial judge must view the evidence most favorably to the plaintiff (see, e.g., *Rebozo v. Washington Post Co.*, supra, 637 F.2d 381; *Yiamouyiannis v. Consumers U. of United States*, supra, 619 F.2d 940; *Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael*, supra, 492 F.2d 441; *Reader's Digest Assn. v. Superior Court*, supra, 37 Cal.3d 252, 208 Cal.Rptr. 141, 690 P.2d 614; *Tucci v. Guy Gannett Pub. Co.*, supra, 464 Atl.2d 166-167; *Nader v. de Toledano*, supra, 408 Atl.2d 50). The judge

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[8] Aside from questions of actual malice in libel cases, clear and convincing evidence is required in proof of a variety of legal issues, including, for instance, fraud and mistake sufficient to justify reformation of an instrument. In such contexts, the courts have not hesitated to incorporate the non-moving party's heavier burden of proof into the summary judgment determination. For instance, in *Lester v. Pickwick International, Inc.* (E.D.N.Y. 1981) 528 F.Supp. 1011, 1013, the court granted a defendant's motion for summary judgment in a fraud case because the "plaintiffs [could not] possibly present clear and convincing evidence of the requisite element of justifiable reliance." Similarly, a defendant is entitled to summary judgment on a statute of limitations defense, even over the plaintiff's claim that untimely filing of the complaint was induced by the defendant's fraud, unless the plaintiff can support his claim of fraud by clear and convincing evidence (see *Ciprut v. Moore* (E.D.Pa. 1981) 540 F.Supp. 817, 822, affirmed (3 Cir. 1982) 688 F.2d 819; *Whitley v. Hartford Acc. and Indem. Co.* (N.D.Tex. 1981) 532 F.Supp. 190, 196-197, affirmed (5 Cir. 1982) 670 F.2d 183). So, too, a plaintiff was granted summary judgment on a claim for breach of warranty under an agreement for payment of retirement benefits, over defendant's claim of good faith mistake in the agreement's calculation of benefits, partly because the defendant failed to produce clear and convincing evidence of mutual mistake (*Hoffa v. Fitzsimmons* (D.D.C. 1980) 499 F.Supp. 357, 362 n. 16), affirmed in part and vacated in part (D.C.Cir. 1982) 673 F.2d 1345).

is *not* to decide issues of credibility, deprive the plaintiff of reasonable inferences in his favor, or decide whether actual malice has been proved with convincing clarity (ibid.). The judge must decide only whether the plaintiff has produced *some* evidence which a reasonable jury could conclude is clear and convincing evidence of actual malice (ibid.).

Although the evidence is to be viewed in the light most favorable to the plaintiff, there is simply no reason why a more lenient standard should be adopted in assessing whether the evidence so viewed discloses a genuine issue of material fact for trial.[9] The *manner* of considering the evidence is the same as in any other summary judgment case. The point is that "[t]he *standard* against which the evidence must be examined is that of

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[9] Exactly what rule the *Liberty Lobby* court advocates in place of the rule applied by other courts is unclear. At one point in its opinion, the court describes the plaintiff's burden in opposing a summary judgment motion as establishing a "minimum of facts supporting the plaintiff's case" (746 F.2d 1570), which sounds suspiciously like a "scintilla of evidence" rule.

In another part of the opinion, the court endorses a statement in the concurring opinion in *Wasserman v. Time, Inc.* (D.C.Cir. 1970) 424 F.2d 920, 922, certiorari denied (1970) 398 U.S. 940 that,

> "[u]nless the court finds * * * that the plaintiff can prove actual malice in the *Times* sense, it should grant summary judgment for the defendant * * *" (746 F.2d 1571).

Since a plaintiff cannot prove "actual malice in the *Times* sense" in the absence of "clear and convincing proof of 'actual malice' " (*Bose Corp. v. Consumers Union of U.S., Inc.*, supra, 104 S.Ct. 1965), this would seem to be an endorsement, albeit unintentional, of the rule applied in other jurisdictions.

Finally, the court states that, in opposition to a motion for summary judgment, a plaintiff is required to present the "minimum amount of evidence that could persuade a reasonable person" on the issue of actual malice (746 F.2d 1571). Here, the opinion is totally confused. "Minimum" again sounds like a scintilla test. Yet, since a reasonable person could not find actual malice absent the clear and convincing evidence required by the constitutional test, the court once more appears to have unintentionally endorsed the rule applied by other courts.

New York Times and its progeny" (*Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael,* supra, 492 F.2d 441) (emphasis in original). Especially in a case in which the underlying facts are not in dispute, the question whether those facts can reasonably establish actual malice with convincing clarity is exactly the decision which this Court has required judges to make.

C. The rationale of the court below is ill founded, and its concerns are illusory.

The *Liberty Lobby* court advanced three arguments in support of its dictum regarding summary judgment: first, that a requirement of clear and convincing evidence of actual malice would compel the court to engage in "weighing" the facts at the summary judgment stage; second, that it would transform the summary judgment motion from a "relatively quick process" into a more extensive evidentiary proceeding; and third, that such a rule would not square with the statement in *Hutchinson v. Proxmire* (1979) 443 U.S. 111, 120 n. 9, that "proof of 'actual malice' * * * does not readily lend itself to summary disposition."[10] The court is wrong on all counts.

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[10] The court also drew an inapt analogy to the criminal context, where, despite the government's ultimate burden of proving guilt beyond a reasonable doubt, a mere showing of "probable cause" at the preliminary hearing is sufficient to take the case to trial (746 F.2d 1570-1571). While it is true that the preliminary hearing in the criminal context and the summary judgment proceeding in the civil context have as one purpose the determination whether there is sufficient evidence to proceed to trial, the main focus, procedures, timing, and legal effect of the two proceedings make them altogether distinguishable. Thus, it is said that "the only legal justification for [the] existence [of the preliminary hearing] is to protect innocent persons from languishing in jail on totally baseless accusations" (*United States v. Mulligan* (6 Cir. 1975) 520 F.2d 1327, 1330, certiorari denied (1976) 424 U.S. 919). This issue of physical custody, totally lacking in the civil context, also influences the timing of the hearing: "[s]uch examination shall be held * * * not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody * * *" (Fed.Rules Crim.Proc., Rule 5(c)). Because the preliminary hearing is held at the very outset of the case, the prosecution cannot be expected to

The court's first two concerns—that a trial court would be required to "weigh" the evidence on a motion for summary judgment, and that plaintiff would have to "prove" his case to the motion judge—are both unfounded for the same reason: A public figure plaintiff need only demonstrate, and the court need only determine, that *some* evidence exists which can withstand the basic test of constitutional sufficiency. Thus, a public-figure plaintiff must only show some evidence which (with all reasonable inferences drawn in the plaintiff's favor) stands a reasonable chance of establishing the existence of actual malice under the clear and convincing standard:

> "The public figure plaintiff, to survive a motion for summary judgment, is not required to prove actual malice with convincing clarity *to the motion judge. Nader v. de Toledano, supra*, at 408 A.2d 49. Resolution of genuine issues of fact are for the jury. But where it appears that no reasonable jury could find actual malice with convincing clarity, the defendant is entitled to summary judgment" (*Herbert v. Lando*, supra, 596 F.Supp. 1188) (emphasis in original).

The plaintiff's burden to offer some evidence of a genuine issue as to actual malice does not even arise unless the defendant first submits affidavits or other proof sufficient to show that there is *no* such genuine issue. Otherwise, the plaintiff may prevail simply because the defendant's evidence is insufficient to foreclose the possibility of a genuine factual dispute.

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be able to present anything more than rudimentary evidence to support its ultimate burden of proof. Summary adjudication in civil cases, by contrast, usually occurs after discovery is well-advanced. Indeed, one purpose, or at least one practical effect, of the preliminary hearing is to afford the defendant some discovery of the prosecution's case against him (see *Coleman v. Alabama* (1970) 399 U.S. 1, 9), which is certainly not true of the summary judgment mechanism. A final distinction is that the summary judgment, if granted, is, of course, a summary and binding adjudication on the merits. A preliminary hearing, on the other hand, results in no judgment at all. A magistrate's decision that probable cause does not exist in no way "preclude[s] the government from instituting a subsequent prosecution for the same offense" (Fed.Rules Crim.Proc., Rule 5.1(b)).

Moreover, any concern about premature "trials" is answered by Rule 56(f) itself, which allows the court to deny a summary judgment motion if the non-moving party can show that the proof necessary to oppose the motion is for some reason unavailable. This rule will caution defendants against bringing such motions prematurely and will protect plaintiffs from the burden hypothesized by the court below. Indeed, in *Liberty Lobby*, discovery had already closed before the defendants' summary judgment motion was brought. In such cases, the perception that the plaintiff's case will be prejudiced by an early resolution of the actual malice issue is illusory. As the Second Circuit observed in *Yiamouyiannis*, supra, 619 F.2d 940, the summary resolution of the actual malice question should not give courts much pause when "the evidence * * * has been fully marshalled" by pretrial discovery and the parties "do not seek or suggest the need of further discovery."[11]

The court below also referred to footnote 9 in *Hutchinson v. Proxmire* (1979) 443 U.S. 111, 120. This Court, however, has characterized footnote 9 as "implying" disapproval of the notion (expressed in some pre-*Hutchinson* cases) that different *procedural* rules apply to summary judgment motions in libel cases (*Calder v. Jones*, supra, 104 S.Ct. 1488). As demonstrated, application of the constitutional guarantees under the substantive law does *not* give libel defendants the advantage of a special procedural rule; rather, it is a neutral approach to summary judgment such as that employed in any other case.

Moreover, there are several reasons why the usual reluctance to determine "state of mind" issues summarily should not deter summary adjudication of the actual malice issue in libel cases. First, the concept of "actual malice," although it certainly has

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[11] To the extent that the court below was concerned with an increased burden on the courts through what it perceived to be a more extensive evidentiary proceeding on summary judgment (see 746 F.2d 1571), it seems self-evident that the summary resolution of such cases would be less burdensome than trying them. As a practical matter, although the plaintiff will be required to prepare its opposition to a summary judgment motion in light of the constitutional standard, the court itself is not required to treat the motion differently than in other cases. It must, as in all cases, evaluate the evidence against the applicable substantive law.

factual components and has been termed an "ultimate fact" by this Court (*Herbert v. Lando* (1979) 441 U.S. 153, 170), nevertheless is a term of art so fraught with legal limitations that it is a mixed question of fact and law (see *Bose Corp. v. Consumers Union of U.S., Inc.*, supra, 104 S.Ct. 1958-1967; Schwarzer, Summary Judgment Under The Federal Rules: Defining Genuine Issues of Material Fact (1983) 99 F.R.D. 465, 470-476). Because the Constitution limits the reach of state libel law, this Court has mandated that courts must review the entire record and independently assess the constitutional sufficiency of the evidence of actual malice rather than applying the ordinary "clearly erroneous" standard of review established by Rule 52 for purely factual matters (*Bose*, supra, 104 S.Ct. 1958-1965). Courts are likewise competent to enforce those constitutional limits on a motion for summary judgment without invading the province of the jury because such enforcement merely requires the application of a legal standard to the evidentiary facts (see Schwarzer, supra, 99 F.R.D. 470-476).

In addition, the term "actual malice" under *New York Times* does not refer to the common law conception of spite or ill-will, but rather to the defendant's knowledge of actual or probable falsity. Accordingly, the proof will usually depend primarily on documentary evidence, such as printed source material, tape recordings of interviews, research notes, inter-office memoranda and drafts of the article, or on the testimony of third parties, such as the sources interviewed for the allegedly libelous article (see, e.g., *Herbert v. Lando*, supra, 596 F.Supp. 1198-1208, 1211; *Fadell v. Minneapolis Star & Tribune Co., Inc.*, supra, 557 F.2d 109). Although the defendant's subjective state of mind is the ultimate issue, its proof will not, as with most other "state of mind" issues, rest exclusively within the defendant's control or depend solely on the defendant's own testimony.

Finally, as a practical matter, the issue of actual malice, as an "ultimate fact," often will be the only "fact" in dispute on summary judgment. The underlying facts as to the defendant's sources for the article, what information was provided by those sources, and which other available sources were not used, may well not be the subject of disagreement among the parties. In

such instances, the only issue will be whether, on those undisputed facts with all reasonable inferences drawn in the plaintiff's favor, a reasonable jury could determine that the defendant acted with actual malice. This is nothing more than the application of the constitutional standard to an established set of facts and, for this reason, it is particularly appropriate for the motion judge to decide whether the constitutional limits will be transgressed by allowing the litigation to proceed (see Schwarzer, supra, 99 F.R.D. 472-473).

CONCLUSION

For the foregoing reasons, the decision of the District of Columbia Circuit should be reversed.

Respectively submitted,

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